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No. 10-430

IN THE

Supreme Court of the United States

SHANNA WERNER, an individual,
and JAMES BRYANT, an individual,

Petitioners,

v.

PEAK ALARM COMPANY, INC., a Utah corporation;
JERRY D. HOWE, an individual; and
MICHAEL JEFFREY HOWE, an individual,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION

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STATEMENT OF THE ISSUES

1. Can this Court properly entertain a Petition for Writ of Certiorari to a decision of the highest court of a State when the Petitioner fails to establish and support the jurisdictional basis for certiorari review?

2. Should this Court grant certiorari review where the crux of the issues decided by the highest court of a State is (a) the State court's construction of a state statute and (b) the State court's determination, based on its construction of the statute, that questions of fact preclude summary judgment as to whether state actors had probable cause to seize, charge and prosecute an individual under the statute?

3. Should this Court grant certiorari review of federal issues that were not argued to or decided by the State Supreme Court?

CORPORATE DISCLOSURE STATEMENT

Respondent, Peak Alarm Company, Inc., has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE PETITION

As the Utah Supreme Court correctly stated in announcing the challenged decision, this case began with the report of a crime in progress.[1] (Petitioners' Appendix ["P.App."] 2) On the morning of June 27, 2003, a day when school was not in session, multiple audible burglar alarms went off at Salt Lake City's West High School. (P.App. 5) A school employee preparing meals for a City Parks program in the school cafeteria called Peak Alarm Company, the private security company responsible for monitoring the alarms at the school. (P.App. 5) She reported that two unknown individuals had been seen entering closed areas of the school. (P.App. 5) When asked if she would like Peak Alarm to summon the police, she replied that she would, because she "wanted to make sure the [girls] weren't up to some mischief" and no one on the lunchroom staff was "trained to deal with intruders." (P.App. 5)

Respondent Jeff Howe, on duty as Central Station Manager for Peak Alarm, called Salt Lake City police dispatch and reported a "burglary in progress" at the school. (P.App. 6) He mistakenly assumed a uniformed Peak Alarm security guard had verified the alarm at the scene and would meet police in front of the school, when in

1. Petitioners tellingly seek to obscure, from the first sentence of their "Statement of the Case," all of the facts leading up to the seizure, charge and prosecution that underlie this civil case, instead arguing that "[t]his case begins with a citation issued to Respondent Michael Jeffrey Howe." See Petition at 4. As the Utah Supreme Court properly found, however, Respondents adduced facts that preceded the citation and that, if established at trial, show that Petitioners had no reasonable basis in law to proceed against Jeff Howe in the first place.

fact it was the school employee. (P.App. 7) Salt Lake City police officers responded to the scene. They confirmed that two individuals had been seen entering the high school building, and Salt Lake City later issued a press release affirming that a crime had in fact occurred at the school that morning, describing it as "a case of trespass." (Respondent's Appendix ["R. App."] 1a)

Jeff Howe was simply doing his job in compliance with Salt Lake City's "verified response" ordinance. Under that ordinance, police are supposed to respond to a private burglar alarm when someone at the scene has verified it was triggered by potentially criminal human activity. (P.App. 4) There is no dispute that such verification was provided here; nevertheless, Petitioners decided to charge Jeff Howe with making a "false alarm" under Utah Code § 76-9-105 (2002). (P.App. 8-9) That statute criminalizes the reporting of a crime knowing the report is "false or baseless." (P.App. 18-19) The information Petitioners relied upon as the basis for charging Jeff Howe with violating this statute was (a) that he had mistakenly said a uniformed Peak Alarm guard was at the scene and would meet them there, and (b) he allegedly told the police he would say "whatever it takes" to get the police respond because he "thought people were in danger." (P.App. 9)

It is noteworthy that the charge was brought against the backdrop of an ongoing public policy debate, with the Salt Lake City police department on one side and Respondents on the other, over the wisdom and efficacy of Salt Lake City's "verified response" ordinance, and in the wake of a threat by Respondent Shanna Werner that she was determined to bring a high-profile "false alarm" prosecution against a private security central station manager to advance Petitioners' agenda. (P.App. 4-5)

At Jeff Howe's criminal trial, the criminal trial court directed a verdict of not guilty. (P.App. 9-10) The court specifically found "that there was an alarm at West High School, there were two unauthorized individuals on the premises of West High School which caused the alarm, and that no one knew what was the intent of the individuals, including whether they intended to cause a theft or commit a felony while in the West High School premises, and that [the school employee] had asked for police assistance in removing the individuals from the premises." (R.App. 7a) Based on these undisputed facts, the criminal trial court entered specific Findings of Fact and Conclusions of Law that the prosecution had "failed to produce any evidence establishing criminal intent," had "not met the necessary elements to prove Mr. Howe violated Utah Code Ann. § 76-9-105(1), and had presented "no evidence" that Mr. Howe knowingly "made a false alarm as defined by Utah Code Ann. § 76-9-105(1)." (R.App. 7a-8a)

Respondents subsequently initiated the civil case that underlies the instant Petition. (P.App.10) The gravamen of Respondents' civil case is that Petitioners not only "failed to produce any evidence establishing criminal intent," as the criminal trial court found, but also lacked probable cause to seize, charge and prosecute Jeff Howe in the first place, and therefore committed an unreasonable seizure and engaged in a malicious prosecution. (P.App. 10) Indeed, since the objective facts establish that Jeff Howe had every reason to believe a crime was being committed; since Salt Lake City admitted a crime was in fact committed; since Petitioners inexplicably chose to focus their investigation on Jeff Howe rather than the intruders and their actual crime; and since Petitioners and Respondents were engaged in a public debate about the wisdom and efficacy of Salt Lake City's "verified response"

ordinance; Mr. Howe will establish at trial that Petitioners decided to seize, charge and prosecute him not for any legitimate law enforcement purpose, but to punish him for publicly challenging the "party line" on an important public policy issue as part of an ill-conceived and heavy-handed effort to use the criminal law to advance their side of the debate.

Petitioners understandably do not want to give a jury of their peers any chance to hold them accountable for seizing Jeff Howe and bringing a politically-motivated charge and prosecution against him. Thus they sought summary judgment in the trial court below, arguing they had probable cause and should be entitled to qualified immunity as a matter of law because Jeff Howe provided some incorrect information to police in the course of reporting the crime at West High School. (P.App. 11-12) The Utah Supreme Court rejected Petitioners' arguments, holding that Utah's "false alarm" statute "does not criminalize mere false statements," but rather "criminalizes the acts of those who report a crime with knowledge that the report (of the crime) is false or baseless." (P.App. 35) Then, carefully analyzing all the facts relating to whether Petitioners had probable cause to believe Jeff Howe knew there was no crime (even though the facts known to both him and the police proved there was in fact a crime) in light of the applicable summary judgment standards, the Utah Supreme Court unanimously held that Petitioners are not entitled to summary judgment, but that fact issues must be resolved by the jury. (P. App. 36-37) The Utah Supreme Court subsequently denied Petitioners' motion for rehearing. (P.App. 101)

Petitioners now seek the extraordinary remedy of certiorari review by this Court. In so doing, however,

they fail to meet the specific threshold requirements in federal statutes and this Court's rules for establishing the basis for this Court to exercise such review. *See* Argument Section I, *infra*. While Petitioners contrive three issues that give the surface appearance of involving federal questions, the issues in fact center on nothing more than statutory construction and the standards governing summary judgment. Petitioners do not show that the Utah Supreme Court's decision deviates in any respect from any settled federal constitutional or statutory law, let alone one of such national importance as to warrant a grant of certiorari by this Court. *See* Argument Section II, *infra*. Finally, even accepting the federal issues Petitioners create, Petitioners failed to raise those issues below, and they were not even decided by the Utah Supreme Court. *See* Argument Section III, *infra*. Respondents therefore respectfully request that the Petition for Certiorari be denied.

ARGUMENT

I. PETITIONERS FAIL TO ESTABLISH THE JURISDICTIONAL BASIS FOR CERTIORARI REVIEW OF THE UTAH SUPREME COURT'S DECISION.

United States Supreme Court Rule 14(1)(e) states that a petition to this Court for a writ of certiorari "shall contain," among other things, "a concise statement of the basis for jurisdiction in this Court." Petitioners cite 28 U.S.C. § 1254(1) as the statutory basis for this Court's review of the Utah Supreme Court's decision in this case. That statute is inapplicable, since it applies only to review of decisions by the federal courts of appeal.

Petitioners may have intended to cite 28 U.S.C. § 1257(a), which describes the circumstances under which this Court may review by certiorari a decision of the highest court of a State. But Petitioners fail to comply with United States Supreme Court Rule 14(g)(1), which imposes mandatory requirements for establishing this Court's jurisdiction under Section 1257(a). As a result, Petitioners fail to establish a proper basis for the review they seek, and the Petition should be denied for that reason alone.

Section 1257 (a) permits review by this Court by writ of certiorari in limited circumstances: (a) "where the validity of a treaty or statute of the United States is drawn into question"; (b) "where the validity of a statute of any State is drawn into question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States"; or (c) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a).

To ensure that one of these limited circumstances is present, Rule 14(g)(i) states that a petition for certiorari challenging a state-court judgment "shall contain" the following:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific

> portions of the record or summary thereof, with specific references to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix . . . .

Petitioners fail to even address, let alone satisfy, these threshold requirements. Instead, they rely on a wholly inapplicable basis for jurisdiction, and simply leave it to this Court to ferret out whether any federal question was timely and properly raised and whether this Court has jurisdiction to review the Utah Supreme Court's judgment on a writ of certiorari.

Petitioners' failure in this regard may be due to the fact that, while they attempt to frame issues involving rights or immunities under the Constitution or statutes of the United States, a proper reading of the challenged Utah Supreme Court decision shows that it involves nothing more than the Utah Supreme Court's construction of Utah's "false alarm" statute, and the Utah Supreme Court's determination that Petitioners failed to establish on summary judgment as a matter of law that they met the standards for probable cause and qualified immunity to conclude that Respondent Jeff Howe violated that statute. Neither of those determinations deviates from or even implicates any settled federal precedent, let alone one of

such importance as to justify review by certiorari. *See* Argument Section II, *infra*. Or it may be due to the fact that the federal questions Petitioners attempt to create were in fact *not* timely and properly raised below. *See* Argument Section III, *infra*.

In either case, Petitioners' failure to establish and support a proper jurisdictional basis for their Petition alone justifies the denial of the Petition. *See Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (dismissing writ of certiorari as improvidently granted where petitioner lacked standing under 28 U.S.C. § 1254(1) to seek review of the question presented in the petition, as the Court would otherwise "have devoted our efforts solely to addressing a relatively factbound issue which does not meet the standards that guide the exercise of our certiorari jurisdiction"); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing petition for certiorari for want of jurisdiction where "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below").

II. PETITIONERS FAIL TO ESTABLISH THE "COMPELLING REASONS" NECESSARY FOR GRANTING A PETITION FOR CERTIORARI, SINCE ONLY ISSUES OF STATE LAW ARE INVOLVED AND THERE IS NO MISAPPLICATION OF ANY FEDERAL PRECEDENT.

This Court's Rules, and the leading treatise on practice before this Court, identify several considerations governing certiorari review. *See* Rule 10, Rules of the United States Supreme Court; *see also* Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.3-

4.15 (7th ed. 1993)). While those considerations neither control nor fully measure the Court's discretion in granting certiorari, they do "indicate the character of the reasons the Court considers." Rule 10. In pertinent part, those considerations suggest the exceptional remedy of certiorari review may be necessary where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

In this case, the Utah Supreme Court did not decide any question of federal law at all, let alone one of such importance as to warrant review by certiorari, or in a way that deviates in any respect from settled precedent. On the contrary, all the Utah Supreme Court did is to construe Utah's "false alarm" statute, and then conclude, based on the plain language of that statute and established standards of probable cause and qualified immunity, that Petitioners failed to establish as a matter of law on summary judgment that they had a reasonable basis for believing Jeff Howe had violated the statute, necessitating a trial on Respondents' civil claims.

Insofar as relevant here, the issue before the Utah Supreme Court was whether the trial court had properly granted summary judgment dismissing Respondents' Fourth Amendment unreasonable seizure claim on grounds of qualified immunity. Petitioners contended that if they had probable cause to seize Jeff Howe for violation of the statute, then they had qualified immunity as to that

seizure. The Utah Supreme Court could not determine on summary judgment if Petitioners had probable cause for the seizure; however, the court did determine that the trial court erred when it dismissed Jeff Howe's unreasonable seizure claim under qualified immunity. (P.App. 37-38)

The Utah Supreme Court began its analysis by noting the centrality of the issue of probable cause to Petitioners' claim of qualified immunity: "We must also consider whether the seizure was unreasonable or, in other words, whether Mr. Howe provided sufficient facts to demonstrate Sgt. Bryant lacked probable cause for the arrest. If probable cause existed, then the seizure was reasonable [and qualified would apply]; if not, the seizure was unreasonable and exceeded constitutional bounds [and there was no qualified immunity for the seizure]. *See Herring v. United States*, 129 S.Ct. 695, 698 (2009) (stating that the Fourth Amendment generally requires police to have probable cause to make an arrest); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1281 (10th Cir. 2008) '[W]hen a warrantless arrest is the subject of a § 1983 action, . . . a plaintiff must prove that the officer(s) lacked probable cause.')." (P.App. 33, bracketed materials added).

The Utah Supreme Court unquestionably based its analysis on the correct probable cause standards articulated by this Court and lower federal courts: "probable cause to effectuate an arrest requires that we objectively review the actions by police by asking '"whether from the facts known to the officer, and the inferences [that can] fairly . . . be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense."' (P.App. 18) The court further

elucidated the standards from its own as well as this Court's and other federal courts' precedents:

> "Probable cause is based on the totality of circumstances" and employs an objective test questioning whether a reasonable officer would believe the arrested individual has committed a crime. *Cortez*, 478 F.3d at 1116. Indeed, "'[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.'" *Buck*, 549 F.3d at 1281 (quoting *Henry v. United States*, 361 U.S. 98, 102 (1959)); *see Fogarty v. Gallegos*, 523 F.3d 1147, 1156 (10th Cir. 2008).

(P.App. 33-34)

The Utah Supreme Court next stated: "Moreover, to determine whether probable cause existed under the totality of these circumstances, the statute Sgt. Bryant used to cite Mr. Howe must be considered." (P.App. 34) The court identified the elements of the statute as follows: "The false alarm statute imposes criminal liability when (1) an individual reports a crime, (2) the individual knows the report is false or baseless, and (3) the individual knows the report will prompt action by police." (P.App. 35) Because it was undisputed that "Mr. Howe reported a burglary in progress and the point of Mr. Howe's call was to prompt police to respond," the first and third elements clearly were met, and the court properly focused on the second element. (P.App. 35) With respect to that crucial element, the Utah Supreme Court explicitly rejected Respondents' argument (which also underlies their Petition here) that

any "false statement" could give rise to liability under the statute. (P.App. 35: "This statute does not criminalize mere false statements.")[2] Instead, the court held that the "linchpin to criminal culpability" under the statute "is the caller's subjective knowledge that the report is false or baseless as to the existence of a crime." (P.App. 36)

The court then carefully reviewed the evidence proffered by both sides bearing on this contested element of the offense charged, and concluded: "Taking the facts presented by Mr. Howe as true, as we must, we conclude that they tend to show he believed a burglary was occurring at West High School." (P.App. 36) The court emphasized that this conclusion was "largely conditioned on the burden imposed under the analysis," which required that the court "accept the facts as presented by Mr. Howe as true in this part of our analysis." (*Id.*, citing *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1203 (10th Cir. 2006), for the proposition that "[w]hen reviewing an assertion of qualified immunity . . . we are bound to take the plaintiff's allegations as true.")

There is nothing in the foregoing analysis by the Utah Supreme Court that deviates in any respect from the precedents of this Court or any other federal court in

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2. The court expanded: "As an illustration, the statute criminalizes the actions of a homeowner who reports a fire while knowing no fire exists. In contrast, we cannot read the statute to reach a homeowner who calls in a fire but reports that the fire's origin was in the kitchen when it in fact started in a different room. Although the homeowner makes a false statement in the latter example, police would lack probable cause to arrest for making a false alarm because the homeowner did not make the call knowing the report of a fire was false or baseless." (P.App. 36)

terms of the standards for determining probable cause or qualified immunity. On the contrary, the Utah Supreme Court's analysis is perfectly consistent with this Court's own instructions as to what an appellate court must do in cases such as this one: "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (quoting and citing *Carroll v. United States*, 267 U. S. 132, 162 (1925).

Petitioners do not identify, nor did the Utah Supreme Court commit, any error in either articulating or applying the well-established standards governing probable cause, qualified immunity or summary judgment. On the contrary, the Utah Supreme Court applied the proper analytical framework, construed a State statute as it is required to do when assessing probable cause to believe that statute has been violated, and concluded that Petitioners failed to meet their burden on summary judgment to show that they had probable cause, and therefore qualified immunity, as a matter of law. This is a common and unexceptional conclusion. *See York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) (upholding denial of summary judgment based on qualified immunity where, "[v]iewing the evidence in the light most favorable to Mr. York, the district court found that the facts, if proven at trial, could constitute violations of his First and Fourth Amendment rights"); *Reardon v. Wroan*, 811 F.2d 1025 (7th Cir. 1987) (police officers denied qualified immunity on summary judgment because their conclusion of probable cause could be found objectively unreasonable when the facts are viewed in light most favorable to the

plaintiffs); *Jasinski v. Adams*, 781 F.2d 843 (11th Cir. 1986) (*per curiam*) (federal agent denied qualified immunity on summary judgment because of genuine issue of probable cause); *Deary v. Three Unnamed Police Officers*, 746 F.2d 185 (3d Cir. 1984) (police officers denied qualified immunity on summary judgment because of genuine issue of probable cause).

Indeed, this case is quite similar to a federal court precedent from the federal circuit that includes Utah. In *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994), the plaintiff filed a Section 1983 action claiming the defendant officer lacked probable cause to arrest him for obstruction under Oklahoma law. The trial court denied the officer's motion for summary judgment based on qualified immunity, and the Court of Appeals affirmed, concluding that disputed facts and circumstances surrounding the arrest precluded summary judgment: "If, as Mr. Guffey asserts, a finder of fact concludes Officer Wyatt arrested him merely because plaintiff refused to 'call more fouls,' the law is clear defendant acted without probable cause to make the arrest," since failing to "call more fouls" does not amount to "obstruction." *Id.* at 872-73. Similarly in this case, if Petitioners seized, charged and prosecuted Jeff Howe merely because he mistakenly asserted a uniformed Peak Alarm guard was present and mistakenly believed people were in danger, when the underlying crime requires a reasonable basis for concluding that he reported a crime he knew was not occurring, Petitioners lacked probable cause for the seizure, charge and prosecution, leaving them without qualified immunity.

This Court has long held that the existence of probable cause is a mixed question of law and fact that involves

an inherently fact-intensive inquiry dependent upon the particular crime charged and circumstances in which the seizure, charge and prosecution arose. *See Brinegar v. United States*, 338 U. S. 160, 175 (1949) ("The standard of proof [for probable cause] is . . . correlative to what must be proved"); *Ker v. California*, 374 U. S. 23, 33 (1963) ("This Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"; "[e]ach case is to be decided on its own facts and circumstances" (internal quotation marks omitted)); *Terry v. Ohio*, 392 U. S. 1, 29 (1968) (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases"). The Utah Supreme Court's decision placing the determination of probable cause based on its straightforward reading of the State "false alarm" statute in the hands of a civil jury is not even exceptionable, let alone worthy of review by certiorari.

III. PETITIONERS' ATTEMPT TO CREATE FEDERAL ISSUES RAISES ISSUES FOR THE FIRST TIME IN THEIR PETITION AND ISSUES THE UTAH SUPREME COURT NEVER ADDRESSED.

Petitioners assert in their Petition there are three issues for this Court to consider. Those issues are based on incorrect statements as to what the Utah Supreme Court actually did, and in fact frame issues Petitioners did not even raise and the Utah Supreme Court did not even address, much less determine.

A. Petitioners Did Not Argue, And The Utah Supreme Court Did Not Address, Whether Probable Cause Could Be Defeated "Merely Because" Jeff Howe Subjectively Believed He Did Not Violate Utah's "False Alarm" Statute.

The parties never briefed to the Utah Supreme Court, and the Utah Supreme Court never decided, much less determined, the first hypothetical "federal" issue Petitioners frame: whether a police officer lacks probable cause to seize a person "merely because" that person believes subjectively that he had not committed a crime. Respondents can agree for present purposes that one's "protests of innocence" do not alone defeat probable cause. What Petitioners argued to the Utah Supreme Court, and what the Utah Supreme Court actually considered, was far different: whether probable cause existed for the seizure, charge and prosecution of Jeff Howe under Utah's "false alarm" statute merely because Jeff Howe provided *some false or otherwise suspicious information* in reporting the crime. (*See* P.App. 9)

As set forth above, the Utah Supreme Court properly applied the "false alarm" statute, in accordance with its plain language. It held that the statute criminalizes only the knowing false report of a crime. It further held that the disputed issue of probable cause was for the jury to determine, based on that interpretation of the statute, i.e., whether it was reasonable for Petitioners to seize, charge and prosecute Jeff Howe for a violation of the statute. That has nothing to do with whether Jeff Howe believed he violated the "false alarm" statute, but everything to do with whether any officer could reasonably conclude his mistakes provided any basis to believe he knew

there was no crime (when in fact there was a crime). The Utah Supreme Court made no decision about whether probable cause would or would not be made out based on the subjective belief of the seized person that he or she had not committed a crime. Petitioners' purported first issue is merely a hypothetical issue never presented to, considered or determined by the Utah Supreme Court.

B. Petitioners Did Not Argue, And The Utah Supreme Court Did Not Address, Whether Qualified Immunity Is Defeated "Solely Because" Petitioners Disbelieved Jeff Howe's Erroneous Tangential Facts About The Crime He Reported.

The parties also never briefed to the Utah Supreme Court, and the Utah Supreme Court never decided, the second hypothetical "federal" issue Petitioners frame: whether qualified immunity can be defeated "solely because" an officer disbelieves a seized party's explanations. Again, what Petitioners argued to the Utah Supreme Court, and what the Utah Supreme Court actually considered, was far different: whether Petitioners were entitled to qualified immunity as a matter of law because they had probable cause to seize, charge and prosecute Jeff Howe under their interpretation Utah's "false alarm" statute. Petitioners so contended even though Jeff Howe reported a crime and a crime in fact occurred. Petitioners' argument was based on their plainly incorrect reading of the statute and their decision to seize, charge and prosecute Jeff Howe based on their belief that he lied about facts *tangential to the crime he reported.* When the Utah Supreme Court remanded to the trial court the issue of probable cause, the only determination

it made as to qualified immunity was that the trial court had erred in dismissing Jeff Howe's unreasonable seizure claim based on qualified immunity.

In short, the Utah Supreme Court left it for the jury to determine whether there was probable case for the seizure, charge and prosecution of Jeff Howe, such that Petitioners would be entitled to qualified immunity.[3]

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3. Petitioners' argument suggests that they could have lacked probable cause to make the arrest but still be entitled to qualified immunity because they reasonably believed they had probable cause to make the arrest. That suggestion finds no basis in the law. As the Utah Supreme Court correctly ruled, qualified immunity is not available if (a) the government actor's conduct violated a person's constitutional rights, and (b) those rights were well established. (P.App. 27-28) As the Utah Supreme Court noted, there can be no question it is clearly established in the law that an arrest made without probable cause violates the arrestee's Fourth Amendment rights (P.App. 37), and Petitioners do not argue otherwise. Whether Petitioners' conduct violated Jeff Howe's constitutional rights depends on whether Petitioners had probable cause – not whether they subjectively believed they had probable cause. Thus, contrary to Petitioners' suggestion, if as the Utah Supreme Court found Respondents raised sufficient facts that, if true, would defeat probable cause, Respondents also met their burden on summary judgment to defeat qualified immunity. This is exactly what the Utah Supreme Court concluded, and there is no error. (P.App. 29: "the plaintiff must (1) demonstrate that the facts alleged make out a violation of a constitutional right and (2) prove the right was clearly established at the time of the purported violation. Plaintiffs are not required to prove they are entitled to win at this point. Rather, the reviewing court considers whether the facts alleged, if true, would amount to a constitutional violation clearly established at the time of the alleged misconduct. *See Reynolds*, 370 F.3d at 1030 ('As a threshold matter, plaintiff must therefore demonstrate that he has presented sufficient facts to show that defendants' conduct violated' a constitutional right).")

C. Petitioners Did Not Argue, And The Utah Supreme Court Did Not Consider, Whether The Court Could Determine From All The Facts And Circumstances That Probable Cause Existed Under A Proper Reading Of The False Alarm Statute.

Petitioners never briefed or argued to the Utah Supreme Court their third purported issue, that given the clearly proper interpretation of the "false alarm" statute, the court could determine from the facts and circumstances that probable cause existed. In part, Petitioners never so argued to the Utah Supreme Court because they had never so argued in the trial court. In both courts, Petitioners consistently gambled on a plainly erroneous reading of the "false alarm" statute, contending they could have probable cause for the seizure if they believed Jeff Howe lied about *any* facts relating to the reported crime. The Utah Supreme Court could not decide what was not presented to either the trial court or to the Utah Supreme Court.

In any case, that argument is a red herring, since the Utah Supreme Court plainly *did* consider all the facts and circumstances *in the context* of the Utah "false alarm" statute and decided that it could not determine *as a matter of law* that Petitioners had probable cause to seize, charge and prosecute Jeff Howe under that statute. Given the Utah Supreme Court's plainly correct reading of the "false alarm" statute, the court simply could not determine from the facts that probable cause existed as a matter of law. That decision is based on the plain language of the statute, and it is a decision which Petitioners do not challenge and could not properly challenge by the instant Petition,

centering as it does on a State court's construction of a State statute. Petitioners' third purported issue is as hypothetical as their first and second purported issues.

CONCLUSION

The Utah Supreme Court, on appeal of a trial court decision granting Petitioners' motion for summary judgment on the ground (among others) that Petitioners had probable cause as a matter of law to seize, charge and prosecute Jeff Howe for making a false alarm, ruled that the State statute under which Howe was seized, charged and prosecuted requires that he knew his report of a burglary in progress was false, and that genuine issues of material fact exist as to whether Petitioners could reasonably have concluded that he had that *mens rea*, and that those issues must be resolved by a jury in light of the totality of circumstances. There is nothing in that ruling that implicates settled federal law, and certainly nothing that would warrant the exceptional remedy of certiorari review by this Court. Respondents respectfully request that this Court deny the Petition.

DATED this 29th day of October, 2010.

Respectfully Submitted,

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APPENDIX

APPENDIX A — MEDIA ADVISORY OF THE SALT LAKE CITY POLICE DEPARTMENT DATED APRIL 12, 2004

Salt Lake City Police Department
Public Information Office
315 East 200 South
Salt Lake City, Utah 84111

Media Advisory

April 12, 2004
For Immediate Release

Contact Information
Dwayne Baird

Prosecution Case Dismissed Against Peak Alarm Central Station Manager

On June 27, 2003, a Peak Alarm Dispatcher called the Salt Lake Police Dispatch to report a burglar alarm at West High School. The SLCPD dispatcher explained that the department requires a verification on burglar alarm signals before an officer responds due to the 99% false nature of alarm signals in the past.

Minutes later, police dispatch received a call from the Peak Central Station Manager Jeff Howe, claiming there was a burglary in progress at this same high school. He stated that the alarm formerly reported was a "burglary in progress" and Peak Alarm had a guard in uniform, in front of the school with two apprehended persons.

Upon the arrival of seven SLCPD officers, it was apparent that there was no emergency situation and no Peak guard

on scene. At the scene were several West High cafeteria staff members who had left the door open while working in the kitchen. Two girls were seen entering the building, but no one saw them leave. This was a case of trespass and SLCPD would have responded with an appropriate trespass protocol. The cafeteria supervisor stated that at no time did she or her staff, who were on the scene, feel as if this was an emergency.

The Salt Lake City Police Department responded appropriately and quickly to the emergency scene as described by Mr. Howe. Mr. Howe was cited with a Class C Misdemeanor for providing a police department with false information. Judge Iwasaki dismissed the case against Mr. Howe, stating that the prosecution could not prove the amount of information given to Mr. Howe by his dispatchers. Judge Iwasaki did state that seven officers responding to this alarm call was a case of public nuisance.

SLC 0525 POD

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE SALT LAKE CITY JUSTICE COURT DATED MAY 4, 2004

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IN THE SALT LAKE CITY JUSTICE COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RECEIVED
APR 30 2004
Salt Lake City Justice Court

CITY OF SALT LAKE,
Plaintiff,

vs.

MICHAEL JEFFREY HOWE,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 03 CR 11570
Judge Paul F. Iwasaki

Appendix B

The above-entitled matter came on regularly for trial on Monday, April 12, 2004. Paul Curtis of the Salt Lake City Prosecutor's Office represented Salt Lake City. Richard A. Van Wagoner and Trystan B. Smith represented the defendant Michael Jeffrey Howe ("Mr. Howe"). The Court heard the testimony of the following witnesses – Dianne Hoyt, Joann Ryan, Tiffany Simpson, Diane Powers, Shaun Wihongi, and Chuck Smith – and reviewed the exhibits that were admitted into evidence. At the close of the City's case in chief, Mr. Howe moved the Court to dismiss the Information on a number of grounds, both in writing and orally. The Court heard argument and considered defendant's Motion to Directed Verdict, which it granted from the bench. Based upon the foregoing, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Salt Lake City School District ("SLCSD") has a contract with Peak Alarm Co. ("Peak") pursuant to which Peak provides certain security services for SLCSD schools, including West High School. Certain of these services include the use of remote motion sensoring alarms. On June 27, 2003, when school was not in session and no unauthorized individuals were permitted on the premises, certain of these motion sensoring alarms were activated at West High School in Salt Lake City, Utah. Shortly thereafter, Dianne Hoyt, an employee of the Salt Lake City School District, contacted Peak concerning the alarms, which could be heard on the dispatch recording that was admitted into evidence. She informed Peak's dispatcher there were two individuals in the school who

had activated the alarms and they were not authorized to be on the premises. She did not know who the persons were or what their intentions were. When Peak's dispatcher asked if Mrs. Hoyt wanted her to dispatch the Salt Lake City Police, Mrs. Hoyt answered in the affirmative.

2. Peak's dispatcher contacted the Salt Lake City Police Dispatch and informed it of the call from West High School. The police dispatcher said Salt Lake Police would not respond to the call, even though there had been visual confirmation of the two individuals, unless the client itself made the call to Salt Lake City Police Dispatch. Shortly thereafter during the morning of June 27, 2003, the defendant Michael Jeffrey Howe contacted Salt Lake City Police dispatch requesting that the Salt Lake City Police respond to the alarm at West High School, and informing police dispatch they had been unable to reestablish contact with the client.

3. Shortly thereafter, several Salt Lake City Police officers arrived at West High School and attempted to intercede with what may have been a burglary in progress. However, the two individuals reportedly inside West High School had apparently exited the building by the time the police arrived. At least, the police were unable to locate them. However, the Salt Lake City Police officer in charge of the investigation spoke with Mrs. Hoyt who again confirmed that two unauthorized individuals had entered the premises and set off the alarms.

4. On July 25, 2003, Salt Lake City filed a criminal Information against Mr. Howe alleging he had committed the public offense of violating the Utah State Code,

Making a false alarm, specifically, section 76-9-105(1). The original Information charged Mr. Howe with committing a Class B misdemeanor, which, upon conviction, could result in a punishment of a term not exceeding six months and a fine of up to $1,000 plus an 85% surcharge, for a total of $1,850.

5. Mr. Howe demanded a trial by jury. On December 8, 2003, the City filed an Amended Information alleging Mr. Howe had violated the identical state code provision, but amending the Information to an infraction instead of a Class B misdemeanor, which could result in a fine of up to $750.00 plus an 85% surcharge, for a total of $1,387.50.

6. Utah Code Ann. § 76-9-105(1), the single count of the Amended Information, required that the City prove against Mr. Howe the following elements beyond a reasonable doubt in order to convict him of the crime as charged:

> A person is *guilty of making a false alarm if he initiates* or circulates *a report or warning* of any fire, impending bomb, or *other crime* or catastrophe, *knowing that the report or warning is false or baseless* **and** *is likely* to cause evacuation of any building, place of assembly, or facility of public transport, *to cause public inconvenience or alarm or action of any sort by any official or volunteer agency organized to deal with emergencies.*

(Emphasis supplied.)

Appendix B

7. The witnesses and evidence presented by the City established that there was an alarm at West High School, there were two unauthorized individuals on the premises of West High School which caused the alarm, and that no one knew what was the intent of the individuals, including whether they intended to cause a theft or commit a felony while in the West High School premises, and that Mrs. Hoyt had asked for police assistance in removing the individuals from the premises. The evidence presented above was undisputed.

8. None of the evidence presented by the City established Mr. Howe's intent at the time he contacted Salt Lake City Police dispatch, nor was there any evidence presented by the City to establish that Mr. Howe knowingly or intentionally made false representations to Salt Lake City dispatch.

CONCLUSIONS OF LAW

Therefore, the Court hereby concludes:

1. The City has failed to produce any evidence establishing criminal intent.

2. The City has not met the necessary elements to prove Mr. Howe violated Utah Code Ann. § 76-9-105(1).

3. There has been no evidence presented that Mr. Howe knowingly or intentionally made false representations to Salt Lake City

dispatch or made a false alarm as defined by Code Ann. § 76-9-105(1).

4. Accordingly, the defendant's Motion for Directed Verdict is hereby granted.

SO ORDERED.

DATED this 4 day of May, 2004.

BY THE COURT
/s/ Paul F. Iwasaki
Paul F. Iwasaki
Justice Court Judge

APPROVED AS TO FORM:

_____
Paul A. Curtis
Salt Lake City Prosecutor's Office